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No. 136

In the Supreme Court of the United States

OCTOBER TERM, 1951

JAMES W. BUTTERFIELD, DIRECTOR OF THE IMMIGRATION AND NATURALIZATION SERVICE, DETROIT, MICHIGAN, PETITIONER

v.

JOHN ZYDOK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Solicitor General, on behalf of petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit reversing the order of the United States District Court for the Eastern District of Michigan denying respondent's petition for a writ of habeas corpus and remanding the cause to the District Court with directions that respondent be granted bail in a reasonable amount in the deportation proceeding pending against him.

OPINIONS BELOW

The opinion of the Court of Appeals (R. 113-116) is reported at 187 F. 2d 802. The findings of fact and conclusions of law of the District Court appear at pages 12-19 of the record.

JURISDICTION

The judgment of the Court of Appeals was entered March 26, 1951 (R. 113). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in exercising his discretion to grant or withhold bail pending final determination of the deportability of an alien, the Attorney General is justified in denying bail on the ground that the alien is an active participant in Communist Party affairs, or whether he is bound also to consider other circumstances, particularly the likelihood that the alien will report as ordered.

STATUTE INVOLVED

Section 20(a) of the Immigration Act of February 5, 1917 (39 Stat. 874, 890, 54 Stat. 1238, 57 Stat. 553; 8 U.S.C. 156) as amended by Section 23 of the Internal Security Act of 1950 (Pub. L. 831, c. 1024, 81st Cong., 2d sess.), provides in pertinent part as follows:

> * * * Pending final determination of the deportability of any alien taken into custody under warrant of the Attorney General, such alien may, in the discretion of the Attor-

ney General (1) be continued in custody; or (2) be released under bond in the amount of not less than $500, with security approved by the Attorney General; or (3) be released on conditional parole. It shall be among the conditions of any such bond, or of the terms of release on parole, that the alien shall be produced, or will produce himself, when required to do so for the purpose of defending himself against the charge or charges under which he was taken into custody and any other charges which subsequently are lodged against him, and for deportation if an order for his deportation has been made. * * *

STATEMENT

In August 1949, respondent was taken into custody under a deportation warrant of arrest, issued on June 30, 1949 (R. 6-7), charging that he had been, after entry, a member of an organization advocating the violent overthrow of the government, and thus deportable under Section 1 of the Act of October 16, 1918, as amended (8 U.S.C. 137).[1] He was released on $2,000 bail shortly thereafter. (R. 13, 15, 6-7, 27.) In October 1949, a deportation hearing was conducted under the warrant, but, as the result of the decision of this Court in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, it became necessary to grant him a

[1] Section 1 of the 1918 Act has since been further amended by Section 22 of the Internal Security Act of 1950. The effect of Section 22, insofar as pertinent to this case, is discussed *infra*, pp. 8-9.

new hearing. The second hearing began September 19, 1950, but was adjourned at respondent's request. (R. 12, 5, 93, 95, 97, 102-103).

On October 21, 1950, shortly after the effective date of the Internal Security Act, the Assistant Commissioner of Immigration and Naturalization, sent petitioner a radiogram instructing him to apprehend respondent and detain him pursuant to Section 20 of the Immigration Act of 1917, as amended by Section 23 of the Internal Security Act of 1950, *supra*. The arrest was effected two days later under the outstanding warrant. In a radiogram dated October 25, 1950, the Acting Commissioner confirmed the Assistant Commissioner's instructions, specifically stating that respondent was to be held without bail. (R. 15, 22-24.)

Respondent filed a petition for a writ of habeas corpus in the United States District for the Eastern District of Michigan, challenging the validity of his detention (R. 1-2). At a hearing on the writ, the following facts were adduced:

On May 25, 1949, in the course of the investigation leading to the issuance of the deportation warrant of arrest, respondent had testified under oath that he was a member of the Communist Party (R. 105, 87, 51) and was Financial Secretary of the Hamtramck, Michigan, unit of the Party in January 1949 (R. 63-64). He had then testified that, at the last previous meeting of the group, they had discussed the New York Commu-

nist case, methods of raising funds for the defense thereof, and "the Chinese situation" (R. 56) and that, pursuant to instructions received from Communist Party headquarters in New York, he had collected and delivered over $100 for the defense of that case (R. 56-58, 65, 77, 80). He had refused to state the number of persons who usually attended meetings of his unit of the Party or the names of the persons from whom he made the collections, because such information was a Party secret and he did not want to be a "stool pigeon" (R. 58, 76). In addition, respondent entered into a stipulation as to his past Communist record, both at the 1949 and the 1950 deportation hearings. From the stipulation at the 1950 hearing, it appears that he was a member of the Party from 1919 to about 1938, that he was readmitted to the Party in 1947, and that he still occupied the office of Executive Secretary of the Hamtramck unit.[2] (R. 97, 102-104.) The Commissioner of Immigration and Naturalization was furnished with a copy of the record of the May 1949 hearing (R. 92).

Before the evidence as to his Communist background, as related in the preceding paragraph, was introduced, respondent had taken the stand

[2] The record is not entirely clear as to whether he was still Executive Secretary in 1950. Finding of Fact 12 (R. 16) is subject to the conclusion that he served in that capacity only during 1949. Our statement that he still occupied the position in 1950 is based on the testimony at R. 97.

in support of his petition. He testified that he was employed in a cafe, later identified as the Detroit Workmen's Cooperative Restaurant; that he owned a five-room house in Detroit, where he resided with his wife; that he had two sons, a daughter, and five grandchildren, all of whom were born in this country; that both sons served in the armed forces of the United States during World War II; that he had sold about $50,000 in war bonds and donated blood seven times during that war; that he had reported regularly under the terms of his previous bail; and that he did not believe that he had violated any law since the enactment of the Internal Security Act. In addition, he testified that he would remain in this country and comply with any requirement to report as directed, if he were enlarged under bond. (R. 29-32.)

On cross-examination respondent admitted that he had an alias (R. 47-49), stated that he could not recall whether he had sold bonds before the Nazi invasion of Russia or after the beginning of the Korean War (R. 34-35, 61), and declined, on self-incrimination grounds, to answer several questions as to whether he had been affiliated with the Communist Party (R. 39-47, 49, 82). After he had stated that he did not think he had collected funds for the defense of the New York Communist case (R. 50-51), he was questioned as to his testimoney at the investigation in May 1949 (see p. 4,

supra). After part of the record of that testimony had been read to him, he was again asked if he had collected funds for the New York case, and he categorically denied that he had done so (R. 62). But when his attention was specifically called to his inconsistent testimony at the investigation, he reverted to his claim that he could not remember having made a collection for that purpose (R. 64, 66). Similarly, as other questions and answers from the record of the May 1949 hearing were read to him, he repeatedly stated that he could not remember them (R. 63-68, 53-58, 76-80), thus causing the court to remark (R. 72) that his demeanor had changed after the completion of his direct examination, that he had become "extremely evasive," and that "he is a symphony of 'I don't remember, I don't remember, I don't remember.'" Similarly, while respondent denied that the restaurant in which he was employed was controlled by the Communist Party, and while he disclaimed knowing whether the members of the "committee" which he said operated the establishment were Communists, he exhibited considerable reluctance to give their names, and he was forced to admit that there was a deportation warrant outstanding against one of them (R. 36, 38-39).

In denying the petition (R. 19), the District Court found, *inter alia*, that respondent's evasive demeanor on cross-examination demonstrated that

he was still knowingly and wilfully participating in the Communist movement (Finding of Fact 16, R. 16-17); that an alien who has been free on bail pending final determination of his deportability may be rearrested and continued in custody without the issuance of a new deportation warrant of arrest (Conclusion of Law 2, R. 17); and that there had been no abuse of administrative discretion in continuing respondent in custody after his rearrest (Finding of Fact 17, R. 17).

The Court of Appeals for the Sixth Circuit reversed the District Court's judgment, with directions to grant bail in some reasonable amount (R. 113, 115, 116). It held that, in determining the question of whether to deny bail, the Attorney General could not rest on membership in the Communist Party alone, but was under a duty to consider all the attending circumstances, in particular, the likelihood that the alien will appear when ordered to do so (R. 114-115). The opinion states (R. 115):

> The purpose of granting bail is to secure the presence of appellant when and as required. The denial of it is not intended as punishment. If bail is granted in some fair amount there is no reasonable ground to indicate that appellant would forfeit it.

REASONS FOR GRANTING THE WRIT

In view of the fact that the Internal Security Act considerably expands the grounds for deportation, particularly in respect of aliens with Com-

munist backgrounds, the Attorney General has been and will be called upon, more and more, to exercise his authority to grant or deny bail pending deportation proceedings. Since the enactment of the Internal Security Act, approximately fifty alien Communists have instituted proceedings to obtain enlargement on bail pending final determination of their deportability. There has been considerable disagreement in the district court decisions in such cases[3] and the Court of Appeals for the Ninth Circuit has reached conclusions inconsistent with the decision of the court below as to the standards applicable to the exercise of discretion by the Attorney General and to judicial review thereof. *Carlson* v. *Landon*, 187 F. 2d 991 (C.A. 9), petition for certiorari pending, No. 35 of this Term. It is essential, therefore, that this Court resolve the conflict in the lower court decisions for the guidance of the Attorney General and the lower courts.

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[3] *United States ex rel. Klig* v. *Shaughnessy*, 94 F. Supp. 157 (S.D.N.Y.); *Warhol* v. *Shrode et al.*, 94 F. Supp. 229 (D. Minn.); *United States ex rel. Mavrokefalus et al.* v. *Murff*, 94 F. Supp. 643 (D. Md.); *Mangaoang* v. *Boyd*, W. D. Wash., holding that the denial of bail to an alien was an abuse of discretion, despite specific evidence that the alien was a member of the Communist Party some years previously and respondent's testimony that he had evidence, from a confidential source, that the alien was still an active Communist; *In the Matter of Izydor Schultwolf*, W. D. Texas, where a petition for a writ of habeas corpus was dismissed on the basis of an allegation in the return that the respondent had determined, from confidential information, that petitioner was a threat to national security.

In the instant case, the Court of Appeals for the Sixth Circuit holds that, in exercising his discretion to grant or withhold bail, the Attorney General cannot limit his consideration to the alien's Communist activities but must weigh all the attending circumstances, in particular those bearing on the likelihood that the alien will appear when ordered to do so.

In *Carlson* v. *Landon*, 187 F. 2d 991, on the other hand, the Court of Appeals for the Ninth Circuit, on facts not essentially different from those involved in the instant case, held that the District Court had properly "weighed the evidence in the light of the times and, we think, came to the correct and legal conclusions," i.e., that bail had been properly denied, 187 F. 2d at 1003. There, as here, the aliens had lived within the jurisdiction of the United States for extended periods of time; there was no evidence that they had been convicted of any crime or had committed sabotage; they had strong family ties in this country; they had previously been free on bond on deportation charges under the 1918 Act; they had reported for hearings as required; and previous deportation hearings against them had been invalidated under the *Sung* decision.[4] Like respondent, they contended, and

[4] The facts in regard to each of the aliens, as summarized by the Ninth Circuit, may be found in 187 F. 2d, as follows: *Carlson*, pp. 995-996; *Mrs. Stevenson*, pp. 997-999; *Hyun*, pp. 999-1000; *Carlisle*, pp. 1000-1002. In particular the facts in Mrs. Stevenson's case show that she was recently less active in Communist activities than this respondent.

indeed correctly, that the only evidence advanced to support their detention without bail was that they had been active in the Communist movement. In holding that bail was properly denied, the Ninth Circuit, unlike the court below, stressed the importance of "the legislative findings set out in the Internal Security Act of 1950," as to the dangers to national security from the Communist Party, 187 F. 2d at 997. Thus the Ninth Circuit considers that, in exercising his discretion, the Attorney General may give paramount consideration to national security and deny bail solely on the basis of active participation in the Communist Party; the Sixth Circuit holds that he must give paramount consideration to the probability that the alien will appear as ordered and may not deny bail on the basis of Communist activities alone. Only this Court can resolve that conflict.

CONCLUSION

It is respectfully submitted that this Court should grant this petition in order to resolve the conflict between the decisions of the Sixth and Ninth Circuits as to the standards governing the exercise of discretion by the Attorney General.

PHILIP B. PERLMAN,
Solicitor General.

JUNE, 1951.

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